SUPREME COURT, U. S.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 394

ROY SETH HALE,
Petitioner,

v.

TOWN OF VINTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Roy Seth Hale, of Roanoke, Virginia, respectfully prays that a Writ of Certiorari be issued by the above-styled Court to review the judgment of the Supreme Court of Appeals of Virginia, rendered on April 19, 1967 in denying petitioner's Petition for Writ of Error di-

rected to said Court in regard to appeal of an adverse judgment rendered in the Circuit Court of Roanoke County, Virginia on November 9, 1966. No official report of this matter has been printed, the Supreme Court of Appeals of Virginia having denied issuance of the Writ of Error sought in said Court.

PROCEEDINGS IN COURTS BELOW

The references made hereinafter are to the pages of the record of the proceedings in the trial court, the Circuit Court of Roanoke County, Virginia, and are numbered in chronological order of filing and shall be referred to as (R), however, the Transcript of Evidence has not been renumbered and shall be referred to by its original page numbers (Tr.)

Roy Seth Hale, petitioner, was convicted by jury verdict in the Circuit Court of Ronoake County, Virginia on November 9, 1966, on a charge of operation of a motor vehicle while under the influence of intoxicants, in violation of Section 33 of the Town of Vinton, Virginia, Ordinance and his punishment was fixed at a fine of $100.00 and by operation of law, license to operate a motor vehicle in the State of Virginia was revoked for a period of one year. Petition for Writ of Error from said Trial Court judgment was filed with the Supreme Court of Appeals of Virginia and the Trial Court judgment was affirmed by said Appellate Court on April 19, 1967. The question involved herein, which was raised in the Trial Court and in the State Appellate Court is as follows:

That the Trial Court erred in permitting evidence of the blood test taken from the Defendant to be admitted in evidence, in that so doing violated Constitutional rights and guarantees.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257(3).

Upon denial of Petition for Writ of Error by the Supreme Court of Appeals of Virginia (A-1) on April 19, 1967, an Order staying execution of judgment was sought and granted (A-2) on May 5, 1967 in order that petitioner might present this Petition for Writ of Certiorari to review the proceedings below.

28 U.S.C. § 1257(3) provides for review by way of Writ of Certiorari by this honorable Court where a right, privilege or immunity specifically set up or claimed under the Constitution is involved and the constitutional provisions involved herein are as follows, from the Constitution of the United States:

Amendment V

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty,* or property, *without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis by Counsel).

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.* (Emphasis by Counsel).

Amendment XIV

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis by Counsel).

Constitutional questions were raised in the Trial Court and in the State Appellate Court.

QUESTION PRESENTED

That the Trial Court erred in permitting evidence of the blood test taken from the Defendant to be admitted in evidence, in that so doing violated Constitutional rights and guarantees it being Petitioner's contention:

(I) That he was denied fair trial.

(II) That he was denied due process of law.

(III) That he was denied equal protection of the law.

STATEMENT OF FACTS

Petitioner's trial, and pre-trial, plan was based upon the testimony given by the Town's Police Officer, James M. Greenway, in the Police Court Hearing and the petitioner's testimony in such regard. The petitioner's evidence in the Trial Court was that request was made for the opportunity to consult counsel before the blood test was taken and that the opportunity for consultation with counsel by petitioner was denied by Officer Greenway until the blood test had been taken. Petitioner's witness, Richard Lawrence, Assistant Commonwealth's Attorney for the City of Roanoke,

who happened to be an interested spectator in the Police Court Hearing, testified (R-24):

> A. As I recall the testimony, you brought out on cross examining Officer Greenway that he was told he would be allowed to call an attorney, I don't know whether an Attorney's name was ever mentioned or not, but he would be allowed to call an attorney after he had been processed by the Police Department in Vinton.
>
> Q. And then was particular inquiry made of Officer Greenway as to what he meant by being processed?
>
> A. You asked him that question, and, as I recall it, Officer Greenway stated that after he had been booked, or whatever words he used, and after he had been – after he submitted – or had taken a blood test.
>
> Q. And then after that, he would be permitted to call a lawyer.
>
> A. Well, as I understood it, and as I remember, that he was told – that that was what Officer Greenway explained to you that he meant by processing.
>
> Q. All right. That he, Officer Greenway, meant by being processed, that after they got his blood, then he could call an attorney?
>
> A. That's the way I understood it.

The Town's Officer, Mr. Greenway, testified that no request for counsel or opportunity to make a phone call was made by the petitioner before the blood test was taken, (R. 5), however, there was no rebuttal of the testimony of petitioner's witness Lawrence. There is no question whatsoever in the evidence of the case about the proposition that the petitioner never was advised as to his right to counsel or as to his other constitutional rights. See testimony of Officer Greenway (R. 14):

> Q. Mr. Greenwood, at no time did you advise Mr. Hale of his right to counsel, did you?

A. No, sir, I didn't.

Q. All right, sir, and – you say he made no request for Counsel?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Petitioner testified that he had consumed seven or eight bottles of beer over a period of 3½ hours preceding his arrest (R. 29). Officer Greenway testified that the petitioner was "passed out" the biggest part of the time after he was placed under arrest prior to the taking of the blood sample (R. 5 and R. 18).

REASON FOR ALLOWANCE OF CERTIORARI

The basic issue herein is whether or not one charged with a misdemeanor is entitled to the great constitutional rights which others charged with crimes are, and in particular the right to be advised as to the right to counsel. The right to be advised as to the right to counsel is a basic prerequisite to due process of law – and the ultimate question is does the Constitution guarantee due process of law to one charged with a misdemeanor.

The dilemma of the Trial Judge in applying the great constitutional decisions cited hereinafter in the evolving law of the land is a perplexing one, which this honorable Court should resolve for the bar, bench and people of this land. The criminal defense bar may argue forever to the Trial Courts that the "law of the land" extends to misdemeanants, but until this honorable Court rules positively on the subject, the issue is still debatable and unresolved – to the confusion of justice. See the dissenting opinion by Mr. Justice Stewart in the October 17, 1966 Denial of a Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Arkansas in the case of *Winters v. Beck*, 87 S.Ct. 208, 17 L. Ed. 2d 137 at 138:

This decision of the Supreme Court of Arkansas is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit, which has held that indigent defendants have a constitutional right to counsel in misdemeanor cases. McDonald v. Moore, 353 F.2d 106; Harvey v. Mississippi, 340 F.2d 263. This conflict must be resolved, unless the Constitution of the United States is going to mean one thing in in Arkansas and something else in Mississippi.

In Gideon v. Wainwright, supra, we said that "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." No State should be permitted to repudiate those words by arbitrarily attaching the label "misdemeanor" to a criminal offense. I think this Court has a duty to resolve the conflict and clarify the scope of Gideon v. Wainwright. I do not suggest what the ultimate resolution of this problem should be, but I do suggest that the answer cannot be made to depend upon artificial or arbitrary labels of "felony" or "misdemeanor" attached to criminal offenses by 50 different States. Whatever one's view may be as to the appropriate exercise of this Court's certiorari jurisdiction, surely it is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded with an even hand in all the States.

For these reasons I would grant certiorari, hear argument and decide the important issue which this case clearly presents.

Mr. Justice Black would also grant the petition for certiorari.

ARGUMENT

It is conceded that the evidence of the case may have been such that the petitioner might have been convicted without the introduction of the evidence as to the blood test and the analysis of same. However, certainly there can be no real question that the evidence introduced as

to the blood test was prejudicial and that petitioner should be awarded a new trial if the introduction of the evidence of the blood test was improper. There are several issues presented in regard to the erroneous action of the Trial Court in admitting the evidence as to the blood test and analysis: (1) The Arresting Officer, after the arrest, failed to advise the petitioner as to his constitutionally guaranteed right to consult with counsel and of his right to not give evidence against himself and thereby incriminate himself; and (2) The denial of the right to consult counsel upon request for such consultation.

Under the Statute Law of Virginia the so-called and often misnamed "Drunk Driving Law" pertaining to operation of a motor vehicle while under the influence of intoxicants and/or narcotics, Code § 18.1-54, § 18.1-58, and § 18.1-59 (A-3) providing for penalty, make the violation of said Statute a misdemeanor crime and provide for maximum punishments (for a first offense) of up to a One Thousand Dollar fine or by confinement in jail for not less than one month nor more than six months, either or both. The alleged Town Ordinance provides for the same maximum punishment, although having a lesser minimum fine, the Town's being One Hundred Dollars and the State's being Two Hundred Dollars. The Virginia Implied Consent Law, and the Town Ordinance upon which same is purportedly based, is not a mandatory law requiring one to submit to a blood test when charged with the operation of a motor vehicle while under the influence, as appears to be the law under certain of the other States. See § 18.1-55.1(c), Code of Virginia (A-3) which does not require a defendant to submit to the taking of a blood sample, although a defendant may be subject to a further charge for his refusal to do so. The Virginia Court ruled in the case of *Walton v. City of Roanoke* (1963), 204 Va. 678, 133 S.E.2d 315, that the Implied Consent Statute of Virginia does not violate Section 8 of Article 1 of the Virginia Constitution and holding that said state constitutional provision, like its federal counterpart, is designed to protect an accused against the em-

ployment of legal process to exact an admission of guilt and does not extend beyond testimonial compulsion. The Virginia Law provides a choice. A defendant is not compelled to submit to the blood test and, by statute, his refusal cannot be used as evidence in his trial on the charge of driving under the influence of intoxicants.

This is not the case under the laws of some of the States. See *Schmerber v. State of California,* (1966), 384 US 436, 16 L ed2d 694, 86 S Ct 1602, wherein it was held that since the accused was not entitled to assert his privilege against self incrimination with respect to introduction of evidence of blood test in prosecution for driving while under influence of intoxicating liquor, compelling petitioner to submit to test in face of fact that his objection to test was made on advice of counsel did not constitute denial of petitioner's Sixth Amendment right to assistance of counsel. This is an important and vital distinction, since under Virginia Law the taking of the blood test is not mandatory. It is respectfully submitted that it is absolutely vital in a case of an operation under the influence charge that the defendant have guidance and advice of counsel in order that due process may be had.

Obviously, the case has passed the investigatory stage and a defendant has been placed under arrest before the question of the blood test is presented. The Virginia Legislature wisely and fairly recognized the dilemma of one faced with a charge of operation of a motor vehicle while under the influence and that such a defendant should not be left to the tender mercy of the arresting officer, or other members of the Police Department, and left to the counsel, guidance and advice of the police arm of the government in enacting Code § 18.1-55.1 (c) which provides in the event of refusal to take the test:

> . . . The arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal,

> and so declares again his refusal in writing upon a form provided . . .

Therefore, Virginia recognizes the right and need of counsel and the serious question of individual rights involved as guaranteed by the constitutions. Now we approach the great iceberg-like problem of constitutional rights of one charged with a misdemeanor. To slice through to the heart of the matter, it must be recognized that an incriminating statement or admission to test, must be elicited for a constitutional right to be violated. See *Escobedo v. Illinois,* (1964), 378 US 478, 84 S Ct 1758, 12 L ed 2d 977. The constitutional rights in the case at bar is the right to remain silent and not give evidence against oneself and to be advised, by the arresting officer, as to said right and the right to consultation with counsel.

Of course, an arresting officer need not close his ears to voluntary statements made by a person in his presence, *Ward v. Commonwealth,* (1964), 205 Va. 564, 138 S.E.2d 293. The learned Trial Judge in the case at bar apparently felt that there was no duty on the part of the arresting officer to advise defendant as to his constitutional rights and that evidence of blood test was therefore proper evidence (R. 41):

> THE COURT: Which motions the Court overrules. Number 1: the Defendant himself did not state he refused to take a blood test, but on the other hand said he wanted to take the blood test, and did so before he had ever requested Counsel. *That this would go to whether or not he was entitled to Counsel as a matter of law, which the Court rules is not required on a misdemeanor charge.* (Emphasis by Counsel).

It is respectfully submitted that the case at bar must be viewed in light of the *Escobedo* case, supra, and *Miranda v. Arizona,* (1966), 384 US 757, 16 L ed 2d 694, 86 S Ct 1602 dealing with the constitutional prerequisites as to admissibility of evidence taken from a defendant without advising him as to constitutional rights. Further, in the case

at bar, we have the most serious question as to intelligent waiver of constitutional rights involved, if indeed there was any waiver, and it is submitted that there was not, taking into consideration the petitioner's education (R. 3, third grade), apparent physical condition to arresting officer (R. 5 and R. 11, passed out) and apparent intelligence (R. 7, Direct Examination of Petitioner on motion in limine), as follows:

> Q. And what happened after you reached the Town of Vinton police station? Tell us in your own words.
>
> A. He asked me did I want to take the blood test, he said if I didn't take it he would have to charge me with refusing to take it. I asked him to call an attorney before he aimed to take me to git the blood test, and he said after I got the blood test I could call an attorney.
>
> Q. Now did you make any specific request in regard to this telephone call to an attorney?
>
> A. No, sir.
>
> Q. Do you know what specific means?
>
> A. No, sir.

It was held in the *Miranda* case, at 384 US 694, that "As a constitutional prerequisite to the admissibility of such statements, the suspect must, in the absence of a clear, intelligent waiver of the constitutional rights involved, be warned prior to questioning that he has a right to remain silent, and that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Also see Annotation on accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269, and in particular page 1287 § 6, Duty of Police Upon Investigation: "With the rules in Escobedo and later cases that under certain circumstances, a suspect is entitled to the assistance of counsel at the police investigatory state, a new duty seems to have been imposed on arresting police officers before they commence inter-

rogation, namely, that of advising the suspect of his right to counsel and of his right against self-incrimination and, if the suspect desires counsel, of helping him to procure the services of one."

The pivotal question is whether the aforesaid duty upon an arresting officer to advise an accused with a full and fair statement of the accused's constitutional rights is applicable to a misdemeanor, and in particular the misdemeanor involved in the case at bar. However, it should be remembered that the jury's verdict does not constitute a finding of fact that the arresting police officer was correct in his testimony, and that the petitioner and the Assistant Commonwealth Attorney of the City of Roanoke testifying for petitioner were wrong, in regard to petitioner's position that petitioner requested consultation with an attorney before the blood test was taken and was told that he could not have consultation with counsel until after the blood sample had been withdrawn from his body. The Fifth Circuit Court of Appeals has ruled, in a series of recent cases, as quoted from *Pamplin v. Mason* (1966), 364 F.2d 1, at page 7:

> The Irvin v. Dowd line of cases involves capital crimes. We are of the view, however, that the same constitutional safeguard of an impartial jury is available to a man denied his liberty – here two years – for a misdemeanor as for a felony. See Harvey v. State of Mississippi, 5 Cir. 1965, 340 F.2d 263 (90-day sentence); McDonald v. Moore, 5 Cir. 1965, 353 F.2d 106 (6-month sentence).

The *Pamplin* case involved a defendant convicted in the Texas State Court of a misdemeanor, namely aggravated assault upon a local peace officer. The *Harvey* case involved a conviction in the Mississippi State Court upon a charge of possession of whiskey, a misdemeanor punishable under the Mississippi Statute of fine of up to Five Hundred Dollars and up to ninety days in jail. The *McDonald* case concerned a conviction in the Florida State Court on two misdemeanor charges of illegal sale of whis-

key and of illegal possession of whiskey, said offenses being misdemeanors under the Florida Statutes. The *Harvey* and *McDonald* cases specifically involve, and turn upon, the respective defendant's right to assistance of counsel in misdemeanor cases. *McDonald* quotes with approval at 353 F.2d 109, the Court's quotation approved in *Harvey* from *Evans v. Rives,* (1942 D.C. Cir.) 75 U.S. App.D.C. 242, 127 F.2d 623 a case involving a federal misdemeanor:

> It is * * * suggested * * * that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one. 126 F.2d at 638.

In the aforesaid misdemeanor cases coming from State Courts into the Federal Court via habeas corpus, the accused misdemeanants were ignorant and illiterate folk who obviously needed guidance of counsel. There is little to distinguish the aforesaid cases from the instant appellate matter, except that in a charge of operation under the influence the most vital time of the case, both from the point of the prosecution and of the defense, is what the facts are at, or immediately after, the arrest. As set forth in *Escobedo,* the Supreme Court of the United States of America held (378 US 490, 84 S Ct 1765):

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but (1) has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements, (4) the suspect has requested and been denied an opportunity to consult with his lawyer, and (5) the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainright, 372 US at 342, 83 S Ct at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

In the case at bar, all of the Escobedo requisites are present, with the distinction being that instead of a confession obtained from the defendant, a blood sample was obtained, which distinction changes not the principles involved in his deprivation of constitutional rights. It is respectfully submitted that the evidence as to the blood test should have been excluded from the evidence of the case in the Trial Court and that failure to so do was prejudicial and reversible error. The Constitution of the United States, Amendment VI, provides:

> *In all criminal prosecutions,* the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defence.* (Emphasis by counsel)

The constitutional right to counsel and the right to be informed as to this right and other constitutional rights so as to be afforded due process of law has been there for all these many years, but went almost uniformly disregarded and unheeded until the last few years when and after the United States Supreme Court announced the law of the land in this field. See *Miranda v. Arizona, supra,* at 16 L ed 2d 694, 705:

> We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution – that "No person. . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel" – rights which were but in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . : designed to approach immortality as nearly as human institutions can approach it," Cohens v. Virginia, 6 Wheat. 264, 387, 5 L.ed 257, 287 (1821).

also see at 16 L ed 2d 721, in *Miranda v. Arizona:*

> An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we have delineated have been given. The accused who does not know his rights and therefore does not make a request may

be the person who most needs counsel. As the California Supreme Court has aptly put it:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." People v. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal. Rptr. 169, 177-178 (1965) (Tobrimer, J.).

In Carnley v. Cochran, 369 U.S. 506, 513, 8 L.ed 2d 70, 75, 82 S.Ct. 884 (1962), we stated: "It is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is prerequisite.

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such

a warning is there ascertainable assurance that the accused was aware of this right.

> If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as for the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.

See 5 ALR3rd 1275: "It is now generally settled, following *Hamilton v. Alabama,* (1961), 368 US 52, 7 Led2d 114, 82 S. Ct. 157, that an accused is entitled to the assistance of counsel at a 'critical stage' of the state's criminal proceedings, and this stage may occur before arraignment, and indeed, as early as the police investigation stage under certain circumstances. The following post-Hamilton cases, expressly or by implication, recognize, 'criticalness' of the stage of the proceedings in question as the most important factor in determining the time at which the right to the assistance of counsel arises."

How can it seriously be said that one charged with operation of a motor vehicle while under the influence of intoxicants is not faced with a serious charge? Plaintiff in error could have received punishment of up to a thousand dollar fine and jail sentence of six months. The circumstances that he has been fined $100 changes not the seriousness of the criminal charge made against him. Let us not be led astray by the great cry of the prosecutor

that he cannot effectively prosecute in an operation while under the influence charge if a defendant be granted his constitutional right to be advised as to right of counsel, etc.

Let it not be seriously heard that a defendant's constitutional rights can be violated and disregarded before this Honorable Court simply because compliance with the requirements of constitutional rights may cause some problems and difficulty for the arresting officer. If guaranteeing constitutional rights makes the Implied Consent Law unworkable, it is the fault of the General Assembly of Virginia, but it is not unenforceable at all in that a conviction may be made even though the defendant declines to take a blood test.

Of course, in the case at Bar, petitioner's defense was greatly prejudiced by the admission into evidence of the blood test upon which the Court instructed the Jury that the law presumed the defendant to be under the influence of intoxicants. Petitioner was prejudiced by failure to advise as to right of counsel by arresting officer.

CONCLUSION

It is respectfully submitted that the Petition of Roy Seth Hale herewith made for issuance of Writ of Certiorari should be granted upon the facts and circumstances of the trial of his case as reflected by the record of same and that the case should be remanded for new trial, in accordance with the law and constitutional guarantees so as to accord petitioner due process of law and not deprive him of constitutional rights, which were denied him in the failure to exclude the evidence of the blood test in the Trial Court.

PRAYER

Accordingly, petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

ROY SETH HALE
By Counsel

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Roanoke, Virginia 24011
Attorney for Petitioner

PROOF OF SERVICE

I, John K. Brewer, Office Manager of Thiel Press, printer of the within petition for petitioner, depose and say that on the 18th day of July, 1967, copies of the foregoing petition were served in accordance with Rule 33 of the Rules of the Supreme Court of the United States, by mailing a copy of same, with first class postage prepaid, to the following counsel of record:

RICHARD S. TILLEY
Attorney for the Town of Vinton
Attorney at Law
126 East Lee Avenue
Vinton, Virginia 24179

John K. Brewer

Subscribed and sworn to before me at Washington, D.C., this 18th day of July, 1967.

Notary Public

My Commission expires: _____

APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 19th day of April, 1967.

The petition of Roy Seth Hale for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Roanoke County on the 9th day of November, 1966, in a prosecution by the Town of Vinton against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

/s/ H. Turner, Clerk

VIRGINIA:

Before John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia, on Friday, the 5th day of May, 1967, in vacation of said Court.

Roy Seth Hale, Plaintiff in error,

against Record No. R-7567

Town of Vinton, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment entered herein on April 19, 1967, in order that he may have reasonble time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on April 19, 1967, be, and the same is hereby, stayed, until the 18th day of July, 1967, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

/s/ John W. Eggleston
Chief Justice of the Supreme
Court of Appeals of Virginia

A Copy,

Teste: /s/ H. Turner, Clerk

CODE OF VIRGINIA, 1950

§ 18.1-55.1 Use of chemical test to determine alcohol; procedure; qualifications and liability of person withdrawing blood; costs; evidence, suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions. –

> . . . (c) If a person after being arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

§ 18.1-58 Penalty; subsequent offense; prior conviction. – Any person violating any provision of § 18.1-54 shall be guilty of a misdemeanor and shall be punished, for a first offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by confinement in jail for not less than one month nor more than six months, either or both in the discretion of the jury or the court

trying the case without a jury. Any person convicted within any period of ten years of a second or other subsequent offense under § 18.1-54, or convicted of a first offense under § 18.1-54 after having been convicted within a period of ten years prior thereto of an offense under former § 18-75, shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than one year. For the purposes of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of § 18.1-54, former § 18-75, the ordinance of any county, city or town, in this State or the laws of any other state substantially similar to the provisions of §§ 18.1-54 through 18.1-57 of the Code shall be considered a prior conviction.

§ 18.1-59. Same; forfeiture of driver's license; suspension of sentence. – The judgment of conviction, or finding of not innocent in the case of a juvenile, if for a first offense under § 18.1-54, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted or found not innocent of the right to drive or operate any such vehicle, conveyance, engine or train in this State for a period of one year from the date of such judgment, and if for a second or other subsequent offense within ten years thereof for a period of three years from the date of the judgment of conviction or finding of not innocent thereof, any such period in either case to run consecutively with any period of suspension for failure to permit a blood sample to be taken as required by § 18.1-55.1. If any person has heretofore been convicted or found not innocent of violating any similar act of this State and thereafter is convicted or found not innocent of violating the provisions of § 18.1-54, such conviction or finding shall for the purpose of this section and § 18.1-58 be a subsequent offense and shall be punished accordingly; and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 394

ROY SETH HALE,
Petitioner,

v.

TOWN OF VINTON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD S. TILLEY
126 E. Lee Avenue
Vinton, Virginia 24179
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Washington, D. C. · THIEL PRESS · 202 · 393-0625

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 394

ROY SETH HALE,

Petitioner,

v.

TOWN OF VINTON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated October 10, 1967, the Town Attorney for the Town of Vinton, Virginia was requested to file a response to the petition for writ of certiorari in the instant case. In accordance with the request contained in the above mentioned communication, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

Roy Seth Hale, petitioner, was convicted by a jury in the Circuit Court of Roanoke County, Virginia, on November 9, 1966, on a charge of operation of a motor vehicle while under the influence of intoxicants, in violation of § 33 of the Town of Vinton, Virginia Ordinances and his punishment was fixed at a fine of $100.00. A petition for writ of error directed to the Supreme Court of Appeals of Virginia from the judgment of the Trial Court was filed with the Supreme Court of Appeals of Virginia and a brief in opposition to the petition for writ of error was filed in said Court. The Supreme Court of Appeals of Virginia affirmed the judgment of the Trial Court on April 19, 1967.

STATEMENT OF FACTS

The petitioner, Roy Seth Hale, was taken into custody on August 27, 1966 in the Town of Vinton, Virginia by Vinton Town Policeman James M. Greenway. Pursuant to § 18.1-55.1 of the 1950 Code of Virginia as amended, Roy Seth Hale was given an opportunity under the Virginia Implied Consent Law, to have a chemical analysis made of his blood so that the amount of alcohol therein, if any, could be determined. The petitioner submitted to the said analysis and simultaneously was charged with the operation of a motor vehicle while under the influence of intoxicants, in violation of Vinton Ordinance No. 33. Petitioner, Roy Seth Hale, was subsequently tried in the Circuit Court of the County of Roanoke, Virginia, said trial being by jury, and was found guilty of the charge. Said petitioner, Roy Seth Hale, retained counsel on the day he was charged and was represented at every stage in the proceedings by counsel on the charge of driving under the influence of intoxicants.

QUESTIONS PRESENTED

I. Does this case present a matter to be determined in the United States Supreme Court?

II. Was the failure to provide counsel for the petitioner a violation of his constitutional rights?

III. Was petitioner denied access to counsel of his own choosing?

ARGUMENT

I

The petition for writ of certiorari to the Supreme Court of the United States fails to set out a case of proper jurisdiction for this Court's consideration.

The petition for writ of certiorari to the Supreme Court of the United States fails to set out a case of proper jurisdiction for this Court's consideration.

At page 2 of the petitioner's petition for writ of certiorari, petitioner invokes the jurisdiction of this Court under Title 28, United States Code § 1257(3) providing for review by writ of certiorari by this Honorable Court where a right, privilege or immunity specifically set up or claimed under the Constitution of the United States is involved. Petitioner alleges that the constitutional provisions involved in this matter are those contained in Amendment V, Amendment VI and Amendment XIV, Section 1 of the United States Constitution and amendments thereto. Amendment V as quoted by the petitioner is as follows:

AMENDMENT V

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

> shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty*, or property, *without due process of law*; nor shall private property be taken for public use, without just compensation." (emphasis by Counsel).

The emphasis supplied by the petitioner is on the following phrase:

> "nor be deprived of life, liberty, or property without due process of law;"

It is respectfully submitted that the Virginia Implied Consent Law, § 18.1-55.1 of the 1950 Code of Virginia as amended (Appendix A-2) does not provide for capital punishment, does not provide a jail sentence, and does not provide that one convicted thereunder will be deprived of any property whatsoever. The punishment under the Virginia Implied Consent Law, § 18.1-55.1 of the 1950 Code of Virginia as amended as stated in paragraph (n) (Appendix A-2) of said Ordinance provides that should a defendant be convicted of a violation thereunder, after a fair trial on the reasonableness of his refusal, he would then have his license to operate a motor vehicle in the State of Virginia suspended for a period of ninety days for a first offense.

In the case of *Walton v. Roanoke*, 204 Va. 678, 133 S.E. 2d 315 in a case dealing with the constitutionality under the Virginia Constitution of the "Virginia Implied Consent Law", § 18.1-55.1 of the 1950 Code of Virginia as amended (Appendix A-2), the Court said "the right to operate a motor vehicle on the highway of this State is not a property or unrestrained right, but a privilege which is subject to reasonable regulation of police power of the State in the interest of public safety and welfare". And further, "he can refuse to submit and his refusal will result at most only in a revocation of his privilege to drive, and then only if the refusal is found, after fair trial, to have been unreasonable".

ARGUMENT

II

Petitioner at page 3 of his petition for writ of certiorari alleges a violation of the rights granted under the Sixth Amendment to the Constitution of the United States and quotes the Sixth Amendment as follows:

AMENDMENT VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*" (Emphasis by Counsel.)

As the Court can readily see, the Sixth Amendment deals with "criminal prosecutions". It is respectfully submitted that we do not, here, have a case of criminal prosecution in that the Virginia Implied Consent Law, § 18.1-55.1 of the 1950 Code of Virginia as amended (Appendix A-2) does not constitute a "crime". There is no incarceration provided for conviction thereunder, there is no fine provided for conviction thereunder and there is no confiscation of property provided for conviction thereunder. The Statute merely regulates the issuance and retention of drivers' licenses in the State, and if I may make the observation, the Statute is as much for the protection of the one suspected of driving under the influence as it is for the protection of the public from the results of driving under the influence.

The petitioner contends that his rights granted under Amendment XIV, Section 1, of the United States Constitution have been violated and quotes on page 4 of his petition Amendment XIV, Section 1 as follows:

AMENDMENT XIV

Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis by Counsel).

As stated therein this Amendment provides in the part emphasized by the petitioner "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is respectfully submitted that the petitioner was never in jeopardy of being deprived of "life, liberty or property" nor "equal protection of the laws". As stated before, the Virginia Implied Consent Law, § 18.1-55.1 of the 1950 Code of Virginia as amended does not provide for imprisonment, does not provide for fine and does not provide that a person shall be deprived of his property; nor is it conceivable that under this Statute one could be denied "equal protection of the laws" as this law applies to all without discrimination and is equal in its administration.

CONCLUSION

The petitioner has not shown a case wherein there is jurisdiction in the Supreme Court of the United States in that the petitioner has relied on the violation of a constitutional guarantee, yet has been unable to show to this Honorable Court wherein he has been denied any rights guaranteed by the Constitution of the United States or the Amendments thereto.

ARGUMENT

III

Petitioner has alleged he was not given an opportunity to contact counsel when he was arrested; however, it is clearly shown by the transcript of testimony taken in the trial of this matter at pages 4 and 5 of the transcript that the petitioner was given an opportunity to contact counsel of his choosing and I quote for the Court's consideration the following testimony: (Transcript page 4)

(By Mr. Barbour) "Q. Well let me direct your attention to your testimony in the Mayor's–excuse me, the Police Justice's Court, in Vinton, at the first hearing in this case. Did you not then and there testify that Mr. Hale requested to speak to me on the telephone?

(By Officer Greenway) A. This was what took place on that. Mr. Hale, after he was arrested and brought back to the police station, he–ah–during the biggest part of the time he was passed out on me, and then, after the warrants were served on Mr. Hale for driving under the influence and wreckless driving, ah–I told Mr. Hale–*he had already requested the blood test*, and I told him that I had already called the Roanoke Memorial Hospital and they was expecting us out there, and as soon as we got back from the hospital, he could use the phone to call whoever he so desired. *At this time he made a statement that he would rot in the damn jail before he used the damn phone so anybody could get him out.* (Emphasis supplied).

(By Mr. Barbour) Q. You state then before this Court that at no time did he make a specific request to call me on the telephone before he was removed from the police station to go to the hospital for the blood test?

(By Officer Greenway) A. No, sir, he never did make a request like that."

And again at page 8 of the transcript in reply to a question by the Court, petitioner answers as follows:

"THE COURT: Did you in any wise refuse to take the blood test or did you agree to take it?

A. No, sir. I agreed to take it."

Petitioner further alleges that the witness for the petitioner, one Richard Lawrence, substantiates this contention of the petitioner in that his testimony was not rebutted; however, I respectfully direct the Court's attention to the answer of said witness at page 23 of the transcript:

(By Mr. Barbour) "Q. Tell us, if you will, whatever testimony, if any, made by Officer Greenway concerning the defendant's request, if any, for consultation with an attorney—consultation with Counsel.

(By Mr. Lawrence) A. *Well, now, as I recall this, I didn't make any notes, and this was a long time ago,* and I have had a number of other cases in Court every day for the City of Roanoke. I do recall though something that you asked Officer Greenway: did he ask—after he had been taken to the jail in Vinton—did he ask—did he—was he advised that he could have a lawyer, or did he ask to be allowed to call a lawyer, something to that effect." (Emphasis supplied.)

As the Court will surely note, this was a most indecisive answer and it was left to the jury to weigh whether or not the witness, Lawrence, recalled the happenings as Counsel for the petitioner insisted he did; and again at page 25 of the transcript of the testimony in answer to a question from the Town Attorney representing the Town of Vinton in this matter, the witness, Lawrence, answered as follows:

"Q. So it's possible that you may not have it on exact recall—every word—that was said?

A. I don't have an exact recall."

Again at page 27 of the transcript, in answer to a question by the Court, the witness, Lawrence, answered as follows:

"THE COURT: If you remember anything, go ahead and say it.

A. Judge, I don't recall whether or not officer Greenway explained all of his rights or any of his rights, or anything like that. The thing I do recall was something was said by this man about a lawyer."

All of this recitation of previous testimony in the case merely goes to show that the witness, Lawrence, readily admitted that he did not have a good recollection as to whether or not Officer Greenway had stated that the petitioner herein was not given the right to consult counsel; however, Officer Greenway in this testimony as cited heretofore specifically sets out that the petitioner was given an opportunity to consult with counsel and refused to do so until later in the day when he, the petitioner, Roy Seth Hale, employed an attorney of his own choosing, and as to the point of whether or not the petitioner sought legal advice before determining whether or not he would submit to a test under the Virginia Implied Consent Law, § 18.1-55.1 of the 1950 Code of Virginia as amended (Appendix A-2), there certainly can be no better evidence than the petitioner's own testimony at page 31 of the transcript.

(By Petitioner) "A. Well, after we got to the police station in Vinton, he asked me did I want to take the blood test, and I told him I agreed to take it—

(By Mr. Barbour) Q. Told him what? What did you tell him?

(By Petitioner) A. I told him I agreed to take the blood test."

And again in answer to a question put to him by the Court at page 34 of the transcript:

(By the Court) "Q. Did you tell the officer you wanted an attorney before you took it, or did you agree to go ahead and take the blood test?

(By the Petitioner) A. I agreed to go ahead and take the blood test, yes, sir.

(By the Court) A. And were you permitted later to call an attorney?

(By Petitioner) A. I called one on Saturday morning because it was so late I didn't want to bother him during the night, and I just waited until Saturday morning, and he come down and got me out.

(By the Court) Q. But that was because you thought it best to wait yourself?

(By Petitioner) A. Yes, sir."

It is respectfully submitted that the petitioner had the opportunity to consult with counsel and refused to do so as shown by his own testimony and further that as soon as the petitioner requested to consult with counsel, he not only was given the opportunity, but in fact, did consult with counsel and was, in fact, represented by counsel.

CONCLUSION

It is respectfully submitted to this Honorable Court that no case of Federal jurisdiction has been made out in the petition for writ of certiorari in that no constitutional right has been violated. It is further submitted to this Court in answer to the petition for writ of certiorari that the petitioner was represented by counsel of his own choosing after having been given the opportunity earlier to consult with counsel and having refused said opportunity; that the petitioner has not been denied due process of law nor has he been deprived of any constitutional rights.

PRAYER

Accordingly, the Town of Vinton prays that this writ of certiorari be denied and that the ruling of the Virginia Supreme Court and the Circuit Court of the County of Roanoke, Virginia, be affirmed.

Respectfully submitted,

TOWN OF VINTON, VIRGINIA

By Richard S. Tilley
Counsel

RICHARD S. TILLEY
TILLEY AND PEDIGO
126 E. Lee Avenue
Vinton, Virginia
Attorney for the
Respondent in Error

PROOF OF SERVICE

I, John K. Brewer, Office Manager of Thiel Press, Printer of the foregoing Brief for Respondent in Opposition to the Petition for Writ of Certiorari, depose and say that on the 13th day of November, 1967, said brief was served in accordance with Rule 33 of the Rules of the Supreme Court of the United States, by mailing copies of it, with first class postage prepaid, to the following counsel of record:

Stuart A. Barbour, Jr., Esq., Attorney for Roy Seth Hale, 418 Second Street, S. W. Roanoke, Virginia 24011.

_____

John K. Brewer

Subscribed and sworn to before me at Washington, D.C., this 13th day of November, 1967.

_____

Notary Public

My commission expires: _____

APPENDIX A-1

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 19th day of April, 1967.

The petition of Roy Seth Hale for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Roanoke County on the 9th day of November, 1966, in a prosecution by the Town of Vinton against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

H. Turner, Clerk

APPENDIX A-2

DRIVING AUTOMOBILES, ETC., WHILE INTOXICATED

§ 18.1-55.1. Use of chemical test to determine alcohol in blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions.

(a) As used in this section "license" means any operator's, chauffeur's or learner's permit or license authorizing the operation of a motor vehicle upon the highways.

(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense.

(c) If a person after being arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Exam-

iner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof. No civil liability shall attach to any person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures; and provided further that the foregoing shall not relieve any such person from liability for negligence in the withdrawing of any blood sample.

(d1) Portions of the blood sample so withdrawn shall be placed in each of two vials provided by the Chief Medical Examiner, which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials shall be placed in two containers provided by the Chief Medical Examiner, which containers shall be sealed so as not to allow tampering with the contents. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the vials forthwith to the Chief Medical Examiner. The officer taking possession of the other container (hereinafter referred to as second container) shall, immedi-

ately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses, approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief police officer of the county, city or town in which the case will be heard, and the chief police officer who receives the same shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second container to mail it to the laboratory of the accused's choice chosen from the approved list. As used in this section, the term "chief police officer" shall mean the sheriff in any county having a chief of police, the chief of police of any county having a chief of police, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard.

(d2) The testing of the contents of the second container shall be made in the same manner as hereafter set forth concerning the procedure to be followed by the Chief Medical Examiner, and all procedures established herein for transmittal, testing and admission of the result in the trial of the case shall be the same as for the sample sent to the Chief Medical Examiner.

(d3) A fee not to exceed $15.00 shall be allowed the approved laboratory for making the analysis of the second blood sample which fee shall be paid out of the appropria-

tion for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.1-54, or of a similar ordinance of any county, city or town, the fee charged by the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(d4) If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two (72) hours after receiving said container then said officer shall destroy same.

(e) Upon receipt of the blood sample forwarded to his office for analysis, the Chief Medical Examiner shall cause it to be examined for alcoholic content and he or an Assistant Chief Medical Examiner shall execute a certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the container seal had not been broken or otherwise tampered with, a statement that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the vial from which the blood sample examined was taken shall be returned to the Clerk of the Court in which the charge will be heard. The certificate attached to the container forwarded on behalf of the accused shall also be returned to the clerk of the court in which the charge will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

(f) When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Chief Medical Examiner,

or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such analysis.

(g) Upon the request of the person whose blood sample was taken for a chemical test to determine the alcoholic content thereof, the results of such test or tests shall be made available to him.

(h) A fee not exceeding five dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.1-54 or of a similar ordinance of any county, city or town, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(i) If any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment.

(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice,

clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section. The warrant shall be executed in the same manner as criminal warrants.

(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried.

(l) When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal.

(n) If the court shall find the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals; the time shall be

computed as follows: The date of the first offense and the date of the second or subsequent offense.

(o) The court shall forward the defendant's license to the Commissioner of the Division of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless, however, the defendant shall appeal his conviction in which case the court shall return the license to the defendant upon his appeal being perfected.

(p) The procedure for appeal and trial shall be the same as provided by law for misdemeanors.

(q) No person arrested for a violation of § 18.1-54 or a similar ordinance of any county, city or town shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.

(r) The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

(t) The governing bodies of the several counties, cities and towns are authorized to adopt ordinances paralleling the provisions of (a) through (s) of this section.